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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
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Consideration of the revised draft United Nations Convention against Transnational Organized Crime, with particular emphasis on articles 1-3, 5 and 6

Proposals and contributions received from Governments

Addendum

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* A/AC.254/24.

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II. Proposals and contributions received from Governments

Argentina*

[Original: English and Spanish]

Article 7 ter: Disposal of confiscated assets

1. Insert the following new paragraph after paragraph 1:

"2. The proceeds from such seizure and confiscation shall be used to defray the costs of providing due assistance to the victim, where deemed appropriate by the States Parties and as agreed by them, in conformity with individual guarantees enshrined in their domestic legislation."

2. The remaining paragraph should be renumbered accordingly.

Azerbaijan

[Original: Russian]

1. While supporting the decision to adopt a United Nations Convention against Transnational Organized Crime, Azerbaijan would like to draw attention to a number of contradictions and inaccuracies in various provisions and articles of the draft of the Convention.

2. The term "organized criminal group" is defined in article 2 *bis* of the Convention as a structured group of three or more persons existing for a period of time and having the aim of committing a serious crime in order to obtain, directly or indirectly, a financial or other material benefit.

3. In the same article, the definition of "serious crime" is given as conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least [...] years or a more serious penalty.

4. In article 2, option 2, paragraph 3,** it is stated that:

"Among the circumstances that may be taken into account in deciding whether there are reasonable grounds to believe that a criminal organization was involved are the following:

"(a) The nature of the offence;

"(b) The transnational character of the offence;

"(c) Whether money-laundering is involved; or

"(d) Whether the offence required significant planning or means for its commission."

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* Amendments previously issued in document A/AC.254/L.90.

** Based on the text of the draft Convention contained in document A/AC.254/4.

5. In many countries, the aforementioned stipulations automatically consign groups of mendicant nomadic gypsies, troupes of artists and brigades of construction workers who conceal their income, together with religious and other associations, to the category of organized criminal groups. Even Greenpeace, with its spectacular campaigns, and manufacturers of home-distilled fruit vodka might also be counted as transnational organized criminal groups under the criminal legislation in force in some States.

6. At the same time, two international professional assassins who have been travelling the world for years carrying out their assignments could not be classified as a criminal group since, according to the draft Convention, they would need one more participant in order to qualify.

7. Ajerbaijan would propose the following definition of an organized criminal group:

> " 'Organized criminal group' means a structured group of two or more persons operating for a period of time and having the aim of obtaining a material or other benefit of any form through the commission of serious crime covered by this Convention, or existing for a period of time on account of such benefit."

8. The two definitions, namely that proposed in the draft Convention and the one formulated above, differ in fundamental ways of vital significance for the fight against organized crime and the observance of civil liberties and rights in this connection. Specifically:

(a) The purpose of the group is not to commit crime but to obtain as a result of its commission a material or other benefit; crime is thus seen as the means to the end of obtaining a benefit;

(b) In the initial stage, the group does not simply exist but operates in the sense of distributing powers, obtaining means, planning and so on. In other words it prepares the commission of an offence with a view to obtaining a benefit. Having obtained a benefit as a result of committing an offence, the group can then exist (second stage) on account of that benefit until a further benefit is obtained through the commission of further offences, and so on;

(c) Two persons do indeed constitute a group. Why should a minimum of three be stipulated for the formation of a group?

(d) Serious offences committed by organized groups are not always aimed at obtaining a financial or other material benefit. For example, the murder of a police officer who has uncovered evidence of the operation of a group can hardly be classified as murder aimed at obtaining a financial or other material benefit since the aim of such a murder is to prevent the liquidation of the group, whereas the benefit stated in the draft is of a different nature.

9. The list given in the draft Convention (art. 2, option 3, para. 1) of specific serious offences is incorrect.

10. This list should be exhaustive. For incomprehensible reasons, it includes the stealing of motor cars but not the theft of property of other persons committed by various means. There is a reference to the stealing of nuclear material, but not a word about the stealing of chemical or bacteriological substances.

11. This question is bound up with what we feel is an incorrect definition of the term "serious crime" (see art. 2, option 2, para. 2), which might consequently include actions with a political or some other basis.

12. Special criticism is to be levelled at the provision on the non-applicability of the Convention to offences with solely domestic connections. The effect of such a provision is that if an organized criminal group operates within the territory of a single State and all its members and victims are nationals of that State, the State Party to the Convention cannot rely on judicial assistance from other States Parties, even if such assistance involves the furnishing of basic information for the purposes of the inquiry. Also, if members of an organized criminal group have taken cover in another State Party to the Convention, their extradition under the Convention will not be carried out.

13. The draft Convention (article 2 *bis*) does not explain all the terms contained in it, which renders it open to ambiguous interpretations. The interpretation of some terms conflicts with their generally accepted sense, while other terms, such as "period of time" are incorrectly interpreted. "Period of time" should not denote a fairly long period of time, but rather any period of time spent working out an agreement or plan to commit some form of serious offence.

14. Various provisions of article 4, entitled "Money-laundering", conflict with one of the basic principles of justice, namely that of double jeopardy, in that they propose that a person may be liable to prosecution for disposing of criminal proceeds. Such prosecution should be a possibility only for persons who have engaged in money-laundering on a single occasion. Systematic involvement in money-laundering should be regarded as participation in the activity of an organized criminal group.

15. Article 4, paragraph 4 (a), of the draft Convention also conflicts with principles of justice since it shifts the burden of proof onto the defendant and predetermines the action to be taken by the judicial authorities, thus compromising their independence.

16. A further conflict with judicial principles is to be found in article 6, paragraph 3, which prescribes intervention by the executive authorities in judicial proceedings; in addition, article 10, paragraph 7, proposes a simplification of the evidentiary requirements related to extradition.

Belarus

[Original: Russian and English]

Article 2 bis: Use of terms

Paragraph (a)

1. Replace the word "three" with the word "two".

Article 4: Laundering offences

Paragraph 1 (c) (A/AC.254/4/Rev.5)

2. Belarus considers that the words "administration, safe keeping" are covered by the word "possession" and that the words "exchange, guaranteeing, investment" are covered by the word "disposal". It is therefore proposed that those words and also the word "transfer" (repeated in paragraph 1 (a)) be deleted from the text of paragraph 1 (c), which could then read as follows:

"(c) The acquisition, possession, use and disposal of property, knowing that it is the proceeds of crime".

In this regard Belarus takes the view that the unlawful act of transporting such property (see text in square brackets) is covered by the text of paragraph 1 (d) of this article.

Paragraph 3 bis

3. Quite apart from the inaccuracy of the translation into Russian of the text of paragraph 3 *bis*, attention is drawn to the lack of logic in this paragraph. On the one hand, the property does not actually constitute the proceeds of crime, but this fact may nevertheless not serve as a defence if it is proved that it does constitute the proceeds of crime.

Article 4 bis: Measures to combat money-laundering

4. While supporting option 1 of this article, which definitely needs further amendment, Belarus nevertheless feels that it is necessary, in paragraph 4, to add the word "financial" before the word "regulatory".

Article 7 bis: International cooperation for purposes of confiscation

5. In view of the fact that article 7 of the draft Convention does not specifically provide for submission of requests in connection with confiscation, Belarus considers that the reference to such a provision in paragraph 1 (a) is out of place. The grounds for the submission of requests, including those related to confiscation, are set out in article 14 of the draft Convention.

6. According to the text of paragraphs 1 (a) and (b), a request for the purposes of confiscation of property is submitted not by the central competent authority of the requesting State but by the actual requesting State Party itself, which does not accord with actual practice in relation to the implementation of current international treaties on legal assistance and is also at variance with the procedures for relations envisaged by article 14, paragraph 8, of the draft Convention.

7. According to paragraph 3, decisions or actions provided for in paragraphs 1 and 2 of this article are to be taken by the requested State Party, in accordance with the provisions of its domestic law.

8. In this regard, it is the view of Belarus that the order of confiscation (see para. 2) should be submitted solely by the competent authority of the requested State Party and Belarus therefore proposes deleting the words "either by the requesting State Party or,".

Article 18: Protection of witnesses and victims

9. The title of this article envisages the protection not only of witnesses but also of victims. However, in the body of the text there is no reference to victims. It is therefore proposed that articles 18 and 18 *bis* be merged into a single article.

Paragraph 1

10. Add the words "and victims" after the words "for witnesses" before "in its criminal proceedings".

Singapore

[Original: English]

Article 7: Confiscation

1. The delegation of Singapore notes the lack of a provision in article 7 that protects from confiscation property that is subject to state or diplomatic immunity.

2. In this regard, Singapore wishes to bring to the attention of the Ad Hoc Committee the following provision, which is found in article 98, paragraph 1, of the 1988 Rome Statute of the International Criminal Court:

> "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity".

3. In the spirit of the above article, Singapore proposes the addition of the following new paragraph after paragraph 8:

> "[...] property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State".

Syrian Arab Republic*

[Original: Arabic]

Article 5: Corporate liability

Paragraph 1

1. There is no need for this provision concerning profit because liability should be incurred based on the act committed, whereas profit is the result of such an act. Accordingly, paragraph 1 should read as follows:

> "1. Each State Party shall provide in its domestic legislation, where appropriate, that corporate persons may be held legally liable if they commit or participate in the commission of, or if they knowingly or through failure of supervision facilitate the commission of, an offence dealt with in this Convention or if they participate in the working of a criminal organization."

* Amendments previously issued in document A/AC.254/L.34.

Paragraph 5

2. This paragraph proposed by Colombia should be retained as it concerns the punishment of natural persons.

Article 6: Effective implementation of the Convention

Paragraph 7

3. Although the word "eventuality" is used in article 3, paragraph 7, of the 1988 Convention, it would be preferable to use the word "possibility" in article 6, paragraph 7, of the draft Convention as it has a more indicative meaning than the word "eventuality".

Paragraph 9

4. Paragraph 9 should be retained, but it would be preferable to move it to article 9, on jurisdiction.

Paragraph 10

5. This paragraph should be deleted since paragraph 5 of article 9 contains the same provision.

Paragraph 11

6. Despite the fact that the words "convicted of an offence" are contained in article 3, paragraph 9, of the 1988 Convention, there is no need to retain the words "is charged with or", as presence at the criminal proceedings is restricted to the persons charged.

7. This paragraph should remain in article 6 and should not be moved to article 10, on extradition.